IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SHERMAN, CLAY & COMPANY,
Appellant,
vs.
SEARCHLIGHT HORN COMPANY,
Appellee

No. 2519

PACIFIC PHONOGRAPH COMPANY,
Appellant,
vs.
SEARCHLIGHT HORN COMPANY,
Appellee.

No. 2518

Reply Brief for Appellants

N. A. ACKER,
Solicitor for Appellants.

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REPLY BRIEF FOR APPELLANTS.

Owing to what is believed to be uncalled for criticism contained between pages 27 and 29 of appellee's main brief filed in connection with case No. 2519, relative to the stipulation printed in full on pages 5 and 6 of said brief, it is deemed only proper on behalf of the Eastern general counsel for appel-

lants to advise the Court fully concerning the actual circumstances in connection with the said stipulation.

The foregoing cases were placed on the 1914 July term calendar of the United States District Court, Second Division, Northern District of California, and were set for hearing August 25th, 1914. On the 3rd day of August, 1914, counsel for appellee served notice at San Francisco, California, on local counsel, as to the taking of rebuttal testimony in Pittsburg, Penn., at Warren, Ohio, and Cleveland, Ohio. The taking of this rebuttal testimony was commenced August 17, 1914, and concluded August 27, 1914, two days after the cases were set for hearing in this Circuit. Such testimony could not have been written up and received in the District Court under ten days from the conclusion thereof. Obviously, it was impossible for the cases to have been heard in this Circuit on August 25, 1914, and such must have been known to counsel for appellee.

The writer advised general counsel, J. Edgar Bull, Esq., located in New York City, that the cases in his opinion, could not be heard on the 25th of August, 1914, due to the absence of testimony. However, Mr. Bull, who intended making the journey to California to argue the cases on behalf of the defendants desired positive assurance that the cases would not be called for hearing on the 25th of August, and it was at the request of said general counsel that the writer requested Mr. Miller to stipulate. There was no urgent request for such stipulation, for the writer was satisfied that the cases could not be heard on August 25, 1914, and such

must have been known to Mr. Miller. However, the stipulation prepared by Mr. Miller was entered into on the writer's part as an assurance to general counsel, and the provisions of the stipulation were understood merely to provide against what is commonly termed dilatory practice in connection with the hearing of the cases in the 1914 October term of Court, but never contemplated the waiving of any legal rights relative to an appeal from the order denying the preliminary injunctions previously applied for.

The cases were thereafter set for hearing for November 24, 1914, and general counsel—J. Edgar Bull, Esq., arrived from New York to attend the hearings, and counsel for appellants were prepared and ready for argument of the cases. However, Mr. Miller had previously, on several occasions, intimated to the writer that these cases should be settled out of Court and requested that the matter be submitted to Mr. Bull on his arrival. This was done and Mr. Bull and Mr. Miller carefully considered the question, with the result that the writer was informed by said gentlemen that the cases were to be dropped from the October term calendar, and that Mr. Miller would visit New York City for the purpose of endeavoring to compromise the litigation. The cases were thereupon dropped from the calendar by Mr. Miller, and Mr. Bull returned East. Thereafter, Mr. Miller made the trip to New York for the purpose of endeavoring to negotiate with the main infringers relative to an amicable settlement out of Court. What took place in New York

is unknown to the writer, excepting the fact that a settlement of the litigation was not concluded.

During the whole of the times mentioned, the present appeals were being perfected.

In view of the foregoing circumstances, it is unjust at this time to charge appellants' counsel with bad faith.

Regarding that portion of the brief appearing on page 20, relative to the delay in securing a hearing in the New Jersey Court where the suits are now pending against the main infringers to the litigation, and from whom full recovery may be had, answer thereto is found in the telegram of March 17, 1915, this day received from Messrs. Fenton & Blount of Philadelphia, Penn., general counsel for the Victor Talking Machine Company, reading as follows:

> "Trenton cases against Victor and Edison are both on Equity calendar to be called Tuesday, April sixth, and counsel notified by Clerk that Court will require answer to the cases. Think you should communicate this fact to your Appellate Court at once."

It will thus be seen that the cases pending against the main infringers will be called at an early date in the New Jersey Court and when the calendar is called they will, on the part of such defendants, be set down for hearing. It is our wish at this time, and always has been, to secure an early hearing of the suits pending against the main infringers to the present litigation.

Counsel for appellees persistently throughout his brief, refers to the appellants respectively as distributing agents of the Victor Talking Machine Company and Thomas Edison, Inc., but such is not the case. The appellants are purchasers of such main infringers, and the horns herein complained of as infringements are horns purchased by the appellants of the main infringers, and for such horns the main infringers are liable for in any accounting had in connection with the New Jersey suits.

In case 2519, Mr. McCarthy, Managing Director of Sherman, Clay & Company, states in his affidavit that all of the horns complained of herein are phonographic horns purchased from the Victor Talking Machine Company, record p. 41.

Mr. Haddon, director and Vice-President of the Victor Talking Machine Company in his affidavit states that the horns complained of were supplied by his company to Sherman, Clay & Company, record p. 47.

In case 2518, Mr. Pommer, President of the Pacific Phonograph Company, states in his affidavit that all of the horns complained of as infringement are horns purchased by the Pacific Phonograph Company from Thomas A. Edison, Inc., record p. 43.

Thus it will be seen that the appellant companies herein purchased the horns complained of from the respective main infringers.

Inasmuch as by stipulation entered into between counsel, all testimony taken in connection with the cases involved herein may be used as testimony in the suits pending in the United States District

Court for the District of New Jersey against the main infringers, the hardship complained of by the appellee, by being placed to large and heavy expense in connection with the retaking of its testimony is eliminated by such stipulation.

It is respectfully submitted that the appellee can obtain full recovery in the suits now pending against the main infringers for all acts of infringement not only claimed herein against the appellants, but equally so for all acts of infringement by the innumerable dealers throughout the United States handling the alleged infringing horns purchased from the said main infringers. Thus, in the main suits the entire litigation may be disposed of, and settlement made therein for all acts of infringement committed by the many hundred of purchasing dealers, and the litigation brought to a speedy conclusion.

N. A. ACKER,

Solicitor for Appellants.